

City Council of the Mayor and Council of New Castle
Special Emergency Council Meeting
Town Hall – 201 Delaware Street – New Castle
Friday – February 5, 2010 – 4 p.m.

Present:

Council President William Barthel
Councilperson John Cochran
Councilperson John Gaworski
Councilperson Ted Megginson
Councilperson Teel Petty

Also present:

Mayor John F. Klingmeyer, City Administrator Cathryn Thomas, City Solicitor Roger Akin

Council President Barthel noted that this Special Emergency Council Meeting was advertised in accordance with the Delaware Freedom Of Information Act (FOIA). The meeting notice and agenda was posted less than seven days in advance of the meeting, however included a proper note relative to FOIA – that the reason the standard meeting notice requirements could not be met was due to information just recently received by the City, which required immediate action, or the City would risk losing grant and loan funding of \$1.3 million.

Council President Barthel reported that the reason for this special meeting of the City Council was to continue discussions on the ARRA (Federal Stimulus) Green Project Reserve projects, which are three separate stormwater capital improvement projects within the City.

The construction bids have been received and reviewed and for two of the three projects are significantly in excess of the original estimate provided by the engineer. For the remaining project, the construction bid was significantly lower than the estimate. The net impact of the total costs for all three projects is a difference of an increase of \$388,127.

When it was known that the project costs exceeded the estimates, and the limit for which the City had obtained voter approval was to borrow \$1.3 million, discussions took place on how to handle the shortfall. One solution was to increase the loan by the \$388K amount. Mr. Akin explored this option and advised City officials that this could be done.

Mr. Akin noted that if the City obtained funding from other sources to cover half of the \$388K, and the other half could be forgiven as part of a grant program, similar to the original \$1.3M, then the net payback of the loan would be the same as the voters approved and would be allowed under with the City Charter. Mr. Akin coordinated his efforts with two attorneys from the Saul Ewing law firm who was handling the legal work for the bonding, representing the Delaware Department of Natural Resources and Environmental Control (DNREC). The City made a proposal to DNREC for an increase

in the loan to \$1.7M, and it was approved as part of an added grant through the Clean Water Advisory Council.

At the same time, Council President Barthel worked along with the Trustees of the New Castle Common, to see if they would fund half of the shortfall – about \$194,000. The Trustees agreed, so the City proceeded towards the end of the bond closing process, with the expectation that final bond would be the increased amount of approximately \$1.7M.

Very late in the process, another senior-level attorney at the Saul Ewing firm had reviewed all the bond-related items and concluded that the City could not increase the bond amount over the \$1.3M which had been approved by voters. Therefore, the \$388K shortfall remained without a plan of how those added costs could be fully covered.

Council President Barthel had made additional contacts, which resulted in the New Castle Conservation District committing to cover approximately \$97,000, and the Green Stone Engineering firm committed to covering \$10,000. These amounts, along with the \$194K commitment from the Trustees, total \$301K, leaving the remaining shortfall at about \$87K.

Council President Barthel said that City Council members need to decide if an added commitment of \$87K in existing City funds is worth it to ensure all three stormwater projects continue in the process and are ultimately constructed to benefit the City. Council President Barthel expressed his opinion that it makes sense for the City to make this added commitment so that the projects may be built.

Councilperson Gaworski agreed with Council President Barthel, that with all the grant funding and other partners assisting the City with the shortfall, that the City should commit to the final \$87K funding to close the gap.

Councilperson Petty said she also agreed, however had continued concerns that further added costs could arise throughout the remainder of the process. Mr. Akin said that there is always the possibility of change orders to the original contracts, to deal with any unknowns prior to the start of construction, and those could result in further added costs.

Councilperson Cochran said he felt the City had come too far in the process not to follow through with committing to the construction contracts to move forward. He added that recent numbers reviewed by the City Council project that the added \$87K could be handled in the City budget.

Councilperson Megginson said he agreed with his fellow Council members, that the City should commit to the remaining \$87K to cover the shortfall. He noted, however, that the problem in the process began when the construction bids were opened and it was discovered that the original engineer estimates were very far off from the bids.

Mr. Akin explained how the repayment process would work under the circumstances. The City will be approved for the \$1.3M bond and as the projects progress, the City will request draws to pay bills which are submitted for construction.

Towards the end of the construction with the majority of the bills paid, the amount of loan will be exhausted. That is when the City will pay their portion of the overage, along with the other partners – the Trustees, the Conservation District and the Engineer.

Mayor Klingmeyer applauded members of the City Council for their actions, noting the great need within the City for these projects. Mayor Klingmeyer suggested that the City might approach the Municipal Services Commission (MSC) and see if they would also partner in sharing costs for the projects.

There remained concerns about the process and the City finding out at the last minute (just prior to when it was required for the bond to close) that the loan could not be increased from \$1.3M to \$1.7M. Mr. Akin gave a chronological report on the process.

The City received an original estimate from a professional engineer, Mr. Bruce Jones of the Green Stone Engineering firm. For all three projects the total cost estimate was a little more than \$1.3 million. The City relied on this estimate when a vote was held and New Castle residents overwhelmingly approved the City borrowing \$1.3 million for the three stormwater projects.

The process proceeded and the construction bids were opened. Bids for two of the three projects were significantly in excess of the original estimates, and the third was significantly lower than the estimates. The net difference for all three projects was a shortfall of about \$388,000.

The City and others involved remained interested in the projects being constructed, even at the higher costs. It was suggested that DNREC could approve the loan being increased to \$1.7 million. A request from the City was made for that to occur, and it was approved.

With that, \$194,000 of the added amount of the loan would be forgiven and the remaining \$194,000 would have to be repaid. The Trustees of the New Castle Common agreed to fund the \$194,000, and Mr. Akin worked with Mr. Andy Taylor, attorney for the Trustees, on a binding agreement between the City and the Trustees, which was accomplished on an expedited basis.

Mr. Akin had been working primarily with Ms. Silvia Shin in the Saul Ewing law office on the bond closing. Mr. Akin was given full assurance that the increased loan could go forward, and the City had adequate security to obtain that loan for \$1.7 million.

Toward the end of the legal review process, Mr. Tim Frey, a principal in the Saul Ewing firm, reviewed the work Ms. Shin and another attorney had performed relative to the bond for New Castle. Mr. Frey then made the determination that legally the City could not be authorized to borrow the higher bond amount of \$1.7 million. Mr. Akin tried to convince Mr. Frey to rethink that decision, however Mr. Frey said he would not recommend the loan closing to DNREC in excess of the original \$1.3 million amount.

Discussions were held about the Trustees obtaining a loan for the \$388,000 difference. This would have the advantage of half being forgiven and result in \$194,000 of savings of local dollars. Mr. Frey determined it was too late in the process for that to occur, with

not enough time available to perform due diligence, however that could be explored for some time in the future.

Council President Barthel inquired why Mr. Akin had waited for Mr. Frey to get involved, since the idea to increase the loan was somewhat out of the ordinary, and Mr. Frey would have to approve the entire transaction at some point. Had the City been aware sooner that the loan could not be increased, Mr. Barthel noted there would have been more time to strategize about how to handle the shortfall.

Mr. Akin said that two attorneys in the Saul Ewing law firm were aware of the proposal to increase the loan. That firm and Mr. Frey waited until the last two days of their review process to make the decision as to the appropriateness of the loan increasing, which decision ultimately did not favor the City.

Mr. Akin noted that the City was a victim in the process from early on when the engineering estimates were developed and then turned out to be very far off the actual costs. Mr. Akin noted, however, he believes there are other DNREC grants the City could seek to cover the \$87,000.

Motion, Discussion and Vote on Resolution No. 2010-4, acknowledging that the total amount the City shall be authorized to borrow for three ARRA Stimulus Funded Green Project Reserve projects shall be \$1,322,500, and further detailing the remaining funding so that the total cost, of \$1,710,627, may be paid in order to cover all costs for all three projects, including a commitment from the City of \$87,000 of existing City funds, an amount above and separate from the loan funding for the projects.

The motion was made by Councilperson Cochran and seconded by Councilperson Megginson. The motion passed unanimously.

A motion was made by Councilperson Megginson to enter into Executive Session to discuss legal and personnel matters. The motion was seconded by Councilperson Petty and was unanimously approved.

Respectfully submitted,

Cathryn Thomas
New Castle City Administrator